STATE CORPORATION COMMISSION.

COM. *ex rel.* A. D. KELLY *v.* SOUTHERN RY. CO.

August 22, 1917.

1. Public Officers—Additional Compensation—Extortion.—It is against public policy to permit public officers to recover additional compensation from third persons for duties rendered in pursuance of obligations laid upon them by law principally because it would tend to encourage bribery and extortion. And at common law if a public officer whose fees or other compensation was fixed by law took anything more than his fees he was guilty of extortion.

2. Same—Less Compensation.—A contract whereby a public officer agrees to perform services required of him by law for a less compensation than that fixed by law is contrary to public policy and void.

3. Same—Railroads—Passes—Case at Bar.—A railroad company granted passes to sheriffs upon the condition that said passes should be in full payment and compensation—(a) for all fees and charges for any and all services which said sheriffs should be called upon to perform for the year for which the pass was granted, or (b) to which such sheriffs might be entitled on account of an action growing out of any litigation in which the company was interested, and (c) of all fees and charges in favor of said sheriffs against the company for the said year and of all commissions that might become due by virtue of any executions against the company which might be placed in the sheriff's hands during the year. It was held that (1) The passes were free passes and their issuance was not only forbidden by Va. Const. § 161, but the so-called contracts under which they were granted were immoral and condemned by the common law. (2) The company was guilty of unjust and unlawful discrimination within the provisions of Chap. III of the Act concerning Public Service Corporations (§ 1294c Va. Code 1904).

4. Same—Same—Penalty.—Where a railroad company has been confessedly engaged in the practice of granting passes to public officials in full payment of all fees and charges for services which said officials should be called upon to perform for the company, and has tried to justify its action by making illegal contracts with such officers, the maximum penalty allowed by law should be imposed upon the company.

OPINION BY C. B. GARNETT, CHAIRMAN.

The complainant in this case alleges that he is a citizen of the State of Virginia, residing in the County of Fauquier, that the Southern Railway Company, a public service corporation, engaged as a common carrier, has granted to one Stanley Woolf, while acting in the official capacity of Sheriff of Fauquier

County, a frank, free pass, free transportation and rebate, thereby discriminating against the complainant and the general public in open defiance and disregard to the plain provision of the Constitution of the State of Virginia, and also of Section 1294c, clauses 2 and 3, and other provisions of Va. Code of 1904.

Complainant further alleges that he has reason to believe and charges that the violation of the Constitution and the laws of the State by the defendant in granting free transportation was by no means limited to the case cited, but was in keeping with the well-established policy practiced by said company, and that many, if not a majority of the sheriffs and civil office-holders of the State, have been recipients of such discriminations granted in their favor by said company.

The defendant in its answer admitted that on January 4th, 1917, an annual pass good over certain portions of the line of the Southern Railway Company in the State of Virginia was sent by the Southern Railway Company to Mr. W. S. Woolf, Sheriff of Fauquier County, said pass being transmitted by a letter, copy of which is filed with the answer. The said letter is in words and figures as follows:

"Norfolk, Va., January 4th, 1917.

"Mr. W. S. Woolf,
"Sheriff Fauquier County,
"Warrenton, Va.

"Dear Sir:

"I enclose Southern Railway Company annual No. C-11529, in your favor, for 1917, good between Strasburg and Warrenton: Culpeper and Alexandria; Calverton and Warrenton; Manassas and Front Royal; which is delivered to you in full payment of and compensation for all fees and charges for any and all services which you may be called upon to perform for which this company may be or become liable during the year 1917; or to which you may be entitled on account of any action growing out of litigation in which this Company is interested; and of all fees and charges in your favor against this Company during 1917; and of all commissions that may become due by virtue of any executions against this Company which may be placed in your hands during the said year.

"I am sending this letter in duplicate and would thank you to acknowledge your acceptance of this pass under the conditions named, on the carbon and return to me for my files.

"Yours very truly,
"(Signed) ROBT. B. TUNSTALL,
"Division Counsel."

The answer further sets out that on February 27th, 1917, a

letter from Mr. Woolf, dated February 22, 1917, returning the annual pass aforesaid, was received.

The answer further states that the Southern Railway has for many years issued passes to sheriffs substantially in the same form as the letter to Mr. Woolf, filed as "Exhibit A," quoted above, and that for the year 1917 the list of sheriffs and deputy sheriffs to whom passes were sent were as follows:

Chas. A. Barbee, Prince William County, Manassas, Va.; W. R. Beales, Mecklenburg County, Boydton, Va.; W. C. Bond, Orange County, Orange, Va.; R. F. Collins, Warren County, Front Royal, Va.; S. W. Lee, Greensville County, Emporia, Va.; J. Coleman Priddy, Charlotte County, Keysville, Va.; A. B. Shackleton, Lunenburg County, Victoria, Va.; J. W. Timberlake, Jr. (Deputy Sheriff), Fauquier County, Warrenton, Va.; R. B. Turnbull, Brunswick County, Lawrenceville, Va.; W. H. Wheeler, Nelson County, Elmington, Va.; W. Stanley Woolf, Fauquier County, Warrenton, Va.; J. S. Yowell, Culpeper County, Culpeper, Va.

The answer further sets out that the pass sent to Mr. Yowell was returned by him on or about February 17th, 1917, without comment.

It is claimed in the answer that the consideration for the issuance of these passes was the compensation and commissions which would otherwise become due to said sheriffs holding these passes during the year for which the pass was issued; that, therefore, the passes were not free passes in any sense of the word but represented compensation for services rendered, and that similar arrangements have been in force for many years; and that for a number of years certain clerks of courts in counties traversed by the Southern Railway made similar arrangements; that at present no such arrangements with clerks of courts are in effect but that the reason for their discontinuance was not believed to be on account of any apprehension concerning the legality of the said arrangements, but simply because the said clerks did not find the arrangements profitable.

At the request of the Commission the Southern Railway has caused to be made up and presented to the Commission a list of intrastate passes issued in the State of Virginia to public officers in the State of Virginia or some political subdivision thereof, for the year 1916.

From this list it appears that for the year 1916 annual passes were issued by the Southern Railway to the following:

Charles A. Barbee, Sheriff, Prince William County; W. C. Bond, Sheriff, Orange County; W. R. Beales, Sheriff, Mecklenburg County; S. W. Lee, Sheriff, Greenville County; J. Coleman Priddy, Sheriff, Charlotte County; R. B. Turnbull, Sheriff,

Brunswick County, W. H. Wheeler, Sheriff, Nelson County; W. S. Woolf, Sheriff, Fauquier County; J. S. Yowell, Sheriff, Culpeper County; J. W. Timberlake, Jr., Deputy Sheriff, Fauquier County.

I.

The first question raised by the record is whether the aforesaid annual passes were franks or free passes, in violation of section 161 of the Constitution of Virginia, which purports to prohibit free transportation of members of the general assembly and of state, county, district, or municipal officers, except members of the State Corporation Commission.

Said section reads as follows: "No transportation or transmission company doing business in this State shall grant to any member of the general assembly, or to any state, county, district or municipal officer, except to members and officers of the State Corporation Commission for their personal use while in office, any frank, free pass, free transportation, or any rebate or reduction in the rates charged by such company to the general public for like services. For violation of the provisions of this section the offending company shall be liable to such penalties as may be prescribed by law; and any member of the general assembly, or any such officer, who shall, while in office, accept any gift, privilege or benefit as is prohibited by this section, shall thereby forfeit his office, and be subject to such further penalties as may be prescribed by law; but this section shall not prevent a street railway company from transporting free of charge any member of the police force or fire department while in the discharge of his official duties, nor prohibit the acceptance by any such policeman or fireman of such free transportation."

It is admitted by the answer that the Southern Railway Company, a transportation company, has granted to the sheriffs of many of the counties, and formerly to the clerks of courts of said counties, annual passes, but it is claimed that such passes were not franks or free passes, but that said passes were issued for a consideration, to-wit, the services to be rendered to the Southern Railway Company by said sheriffs and clerks in the capacity of the public employment of said officers.

In order to justify its claim, defendant in its answer sets up as a defense the decision of the Supreme Court of Appeals in the case of Commonwealth *v.* Gleason, 111 Va. 383.

In that case the Attorney for the Commonwealth instituted *quo warranto* proceedings against certain defendants who were employees of the Chesapeake & Ohio Railway Company and residents of the City of Clifton Forge, but who had been also elected and qualified as members of the City Council; and the question

which was presented to the court was whether a bona fide employee of a railroad company, in qualifying as a member of the City Council, forfeited his office by accepting a pass from the railroad company in the capacity of employee thereof. It was held by the court that, as the passes were received by the residents as compensation for their employment by the railroad company, as private employees of said company, section 161 of the Constitution had not been violated.

That case is clearly distinguishable from the case now before us. In the first place, the relation between the railroad company and defendants in the Gleason case was that of employer and employee, or master and servant, and the compensation which was paid was the compensation of employer to employee, or of master to servant for services rendered in such relation. In the case before us, there is no relation of master and servant between sheriffs and clerks, on the one side, and the Southern Railway Company on the other. The employment of the said officers is by the people and their duties and obligations are owned, not to the railroad company, but to the people; and it is clear that the object of the Constitution was to prevent the very situation which has arisen here, and to prohibit a public officer from being beholden to any one else than the people, so that when he renders his service in his official capacity it shall be without any obligations save those imposed by law.

In the Gleason case the compensation earned by the employees of the railroad company had no connection with their public office. In the case before us, the compensation earned by the sheriffs and clerks of the counties was for duties and obligations fixed upon them by law. In the Gleason case, the relation between the railroad company and its employee was the result of a contract; in this case, the sheriffs and clerks have been chosen by the people to perform services incident to their office and the law fixes their compensation.

In addition the money earned by the employees in the Gleason case belonged to those employees in their individual capacity and they had to account to no one for their expenditure thereof. In this case, the fees earned by the sheriffs and clerks were earned in a public capacity; and ever since the fee bill of 1914 (Acts 1914, ch. 352, p. 707) an accounting has been required of such officers.

The last mentioned statute makes it unlawful for certain officers, including sheriffs and court clerks, to receive, as salaries, allowances, commissions or fees, amounts in excess of the schedules therein named, and requires such officers to pay into the state treasury any sums in excess of the aggregate of the compensation therein prescribed.

Independently of such a statute, it has been constantly held that contracts attempted to be made by public officers with a local corporation or individual which provide for a compensation to such officers different from that provided by law are void as against public policy. Field *v.* Auditor, 83 Va. 822; Norfolk *v.* Pollard, 94 Va. 279, 282; Johnson *v.* Black, 103 Va. 477, 488.

In the case of Johnson *v.* Black, supra, the court held that the members of the Board of Supervisors of Norfolk, who had appropriated and received for their private individual use thousands of dollars in excess of the per diem and mileage provided by the statute, might be compelled by a bill in equity at the instance of the tax-payers to restore to the county treasury such moneys so illegally withdrawn therefrom. In deciding the case the court quoted from 1 Dillon Municipal Corporations, sec. 233, as follows:

"It is a well settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of those duties, even though the salary be a very inadequate remuneration for the services. * * * Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions to the duties properly belonging or which may properly be attached to an office to lay a foundation for extra compensation would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced."

It will be observed that in the case before us the contract was made at the beginning of the year and the passes were granted in consideration of the release by the public officer of any claim for fees or compensation accruing during the year. It is not clear that any fees or compensation must accrue during the year, and it certainly could not be determined at the beginning of the year whether the fees or other compensation would be greater than, equal to or less than the value of the transportation afforded the public officer; in fact, no measure was provided to determine this question.

In 29 American and Eng. Ann. Cas. 579 will be found a complete list of all cases bearing on the right of a public officer whose compensation (either in the form of a salary payable by the public or definite fees payable by individuals) is fixed by law to recover additional compensation from a third person for the performance of acts within the scope of his official duties.

From an examination of these cases it will be seen that at common law if a public officer whose fees or other compensation was fixed by law took anything more than his fees he was guilty of extortion. Hatch *v.* Mann, 15 Wend. (N. Y.) 47. In this

latter case Chancellor Walworth, after showing that in some cases the fees are worth more than the service and vice versa and that any promise to pay more than the statute provided was a promise without consideration, uses the following language:

"* * * These principles are as old as the law itself. Formerly the sheriff received a fixed salary from the crown, and was not permitted to receive any other compensation for his services, either for extra trouble or otherwise, Sherley *v.* Packer, 1 Roll. R. 313; and after it was found expedient to allow them to take fees for particular services, the common law still adjudged them to be guilty of extortion if they took anything more. It became also the settled law at that early day, that a promise to pay money to a public officer for doing that which the law would not suffer him to take anything for, or to pay more than was allowed by law, was merely void, however freely and voluntarily it might appear to have been made. Batho *v.* Slater, Latch R. 54; W. Jones' R. 65, S. C. For, as Sergeant Hawkins says, if once it should be allowed that such promises could sustain an action, the people would be quickly given to understand how kindly they would be taken; and happy would that man be who could have his business well done without them. 1 Hawk. P. C., ch. 68, sec. 4. The principles of these early cases will also be found to be adhered to in the recent English decisions. Lane *v.* Sewall, 1 Chitty 175; Dew *v.* Parsons, Idem, 295; Morris *v.* Burdett, 1 Campb. 218; Bilke *v.* Havelock, 3 Id. 374. And the same principles will also be found embodied in the reported decisions of several of our sister states. Preston *v.* Bacon, 4 Conn. R. 471; Shattuck *v.* Woods, 1 Pick. 175; Bussier *v.* Pray, 7 Serg. & Rawle, 447; Carroll *v.* Tyler, 2 Har. & Gill, 54; Smith *v.* Smith, 1 Bailey 70."

The principal reason why it is against public policy to permit public officers to recover additional compensation from third persons for duties rendered in pursuance of obligations laid upon them by law is that it would tend to encourage bribery and extortion. Weaver *v.* Whitney, 1 Hopk. Ch. (N. Y.) 21. In the course of the opinion in the case last cited, Chancellor Sanford uses the following language:

"The rewards of these officers are established by law; their services are to be performed for these legal rewards; and other private rewards for acts which are required from them as public duties, by the laws of their country and the obligations of their stations, must be regarded as corrupt and illegal exactions. The idea that an officer employed by the public for the performance of a public trust, and paid by his country for his services, may take additional and private compensations for the discharge of his official duties, is wholly inadmissible. A distinction between

bribes for doing a duty, and bribes for violating a duty, may exist in casuistry; and a bribe which has produced a violation of duty may, when viewed in connection with its effect, be more criminal than a bribe not followed by such a result. But the idea now suggested, that bribes for doing a duty are lawful, is a conception which never yet found a place in any code of law or in any system of morals. Vain is the suggestion that private rewards like these are innocent incentives to duty. That he who must be corruptly bought to do his duty will perform any duty with fidelity, is an idle supposition. The necessary tendency of such rewards is to debauch; and the faithful discharge of a public trust, cannot be expected from him who will accept a bribe to do his duty. The distinction between bribes to obtain the discharge of a duty, and bribes for other objects, is far too subtle and fallacious for practice; a restraint too feeble, either for the suborner or for the officer accepting a bribe; a barrier too slight to secure fidelity and integrity in the discharge of public trusts. If these different cases of bribery involve different degrees of moral guilt, both are still crimes; and the sophistical pretense now advanced, that an act criminal in itself becomes lawful, when the intention of the parties committing the offense is to promote the due performance of the public service, must be rejected. The argument that private compensation might be justifiably received for the protection and the services stipulated by this contract, because these objects were matters of public duty, is in itself unsound, subversive of the clearest principles of law and morals, and inconsistent with the pure administration of public trusts. If the services engaged by this contract were within the scope of public duty, they were to be performed as a public duty, which could not be bought or sold for private gain." Weaver *v.* Whitney, 1 Hopk. Ch. (N. Y.) 21.

See also Neustadt *v.* Hall, 58 Ill. 175; Kick *v.* Merry, 23 Mo. 74, 66 Am. Dec. 658; Dull *v.* Mammoth Min. Co., 28 Utah 477, 79 Pac. 1050.

It is also a recognized and well settled rule of law that a contract whereby a public officer agrees to perform services required of him by law for a less compensation than that fixed by law is contrary to public policy and void. See long list of cases in note appended to Bodenhofer *v.* Hogan, 19 Am. & Eng. Ann. Cas. 1073, 1075; also note to Lukens *v.* Nye (Cal.), 36 L. R. A. (N. S.) 244.

While in some jurisdictions it is held that a contract of this kind, being tainted with illegality, the public officer cannot recover for the services so rendered, in these same jurisdictions it has been held that a contract providing for less compensation than that fixed by law is not valid: Willemin *v.* Bateson, 63 Mich.

309, 29 N. W. 374; Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679; Ashland Second Nat. Bk. *v.* Ferguson, 114 Ky. 516, 71 S. W. 429; De Boost *v.* Gambell, 35 Ore. 368, 58 Pac. 72, 353.

The only exceptions to the above rules are found in the following cases: Bloom *v.* Hazzard, 104 Cal. 310, 37 Pac. 1037; Gould *v.* New Portland, 15 Me. 28; May *v.* Moncton, 36 N. Brunswick 377, but we are unable to approve of the holding of these latter cases contrary to the great weight of opinion to the effect that a contract by a public officer to render services for a compensation less than that fixed by statute is invalid.

The doctrines established by the cases cited in the notes above are assented to by Throop on Public Officers, in section 477, where it is said:

"At common law, it has been uniformly held, that a promise to pay money to a public officer, for doing that which the law would not suffer him to take anything for doing, or to pay him more than the law allowed, was void, however freely and voluntarily made; for, as Sergeant Hawkins said, if it should be once allowed that such promises would sustain an action, the people would be quickly given to understand how kindly they would be taken; and happy would that man be, who could have his business well done without them."

See also the same author in sections 482 and 484.

In section 524, the learned author says:

"Extortion, in a large sense, signifies any oppression under colour of right; but in a more strict sense, signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due him, or more than is due, or before it is due. * * * And generally, no public officer may take any other fees or rewards for doing anything relating to his office, than some statute in force gives him, or such as have been anciently and accustomably taken; and if he do otherwise, he is guilty of extortion." Russel on Crimes, 5th Eng. Ed. 303, 304; 5th Am. Ed. 142, and cases cited.

It will be observed that it is laid down that where an officer takes money or other things of value that is not due him or more than is due him or before it is due, this constitutes, in the view of the learned author, extortion. Carrying out this view, the learned author says:

"No public officer may take any other fees or rewards for doing anything relating to his office, than some statute in force gives him * * * and if he do otherwise, he is guilty of extortion."

It is perfectly plain, therefore, that the contracts by which these passes were issued were for an illegal consideration, and, therefore, void.

These contracts being void, what becomes of the defense that the services of the public officers were given as a consideration for the passes? To ask the question is to answer it. The passes were free passes and their issuance to the officers was not only forbidden by the Constitution but the so-called contracts under which they were granted were immoral and condemned by the common law.

II

It will be observed that the constitutional provision hereinbefore quoted not only forbids the granting of a frank or free pass or free transportation but it also forbids the giving of any rebate or reduction in the rates charged by the transportation or transmission company to the general public for like services.

The answer, while denying that the Southern Railway Company had granted a frank or free pass in any case and while claiming that the said annual passes had been granted for a consideration, does not deny that the said company has granted a rebate or reduction of rate charged by said company to the general public for like services.

It will be noted from the letter quoted above that the free pass included in said letter was "in full payment of and compensation for all fees and charges for any and all services which you may be called upon to perform for which this company may be or become liable during the year 1917, or to which you may be entitled on account of any action growing out of litigation in which this Company is interested; and of all fees and charges in your favor against this company during 1917; and of all commissions that may become due by virtue of any executions against this Company which may e placed in your hands during the said year."

It is stated in the answer that it is believed that the clerks have discontinued the arrangement because they had not found it a profitable one; in other words, their fees exceeded the value of the transportation to which the passes entitled them, and it was more profitable for them to pay the regular tolls charged by the company. than to receive free transportation as compensation for their services.

It is also stated in the answer that the issuance of said passes to sheriffs constituted to a small extent an economy on the part of the Southern Railway Company; therefore in the aggregate the sheriffs earned by their legal fees a greater amount as compensation for their services than the cost of their transportation according to the regular tolls. It is entirely possible, indeed very probable, that the fees of some of the officers exceeded the value of their transportation, while in other cases the value of the transportation was greater than the fees earned by the officers.

Do these facts and circumstances set out in the answer constitute the giving of a rebate or reduction in violation of the laws of the State of Virginia? To answer this question correctly, we must consider not only the provisions of the Constitution, quoted above, but also the terms of Chapter III of the Act Concerning Public Service Corporations (section 1294c, Va. Code 1904).

This statute makes it unlawful discrimination for a transportation company directly or indirectly to charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers than it charges, collects or receives for any other person for a like or contemporaneous service.

By the terms of clause 5, transportation companies are required to print and keep open to the public their charges for the transportation of passengers which have been established and which are in force upon their routes; by clause 7 of the same section, it is provided that when the State Corporation Commission shall have authorized or prescribed and published any rates, fares and charges, it shall be unlawful for any transportation company to charge, demand, collect or receive from any person a greater or less compensation for the transportation of passengers than is specified in such published schedules; and by clause 8, transportation companies are required to submit to the Corporation Commission their schedules, rates, fares and charges and of all changes made in the same. By the terms of clause 23, any transportation company which violates any of the provisions of Chapter III of the Act Concerning Public Service Corporations (par. 1294c) may, when not otherwise provided in said chapter, be fined by the State Corporation Commission, in its discretion, in a sum not exceeding $500.00 for each offense.

It is perfectly clear that, in granting passes to sheriffs and clerks of courts upon the condition that said passes should be in full payment and compensation (a) for all fees and charges for any and all services which said sheriffs and clerks should be called upon to perform for the year for which the pass was granted, or (b) to which such clerks and sheriffs might be entitled on account of an action growing out of any litigation in which the company was interested, and (c) of all fees and charges in favor of said sheriffs and clerks against the company for the said year and of all commissions that might become due by virtue of any executions against the company which might be placed in the sheriff's hands during the year, the company was guilty of unjust and unlawful discrimination.

If the contracts under which these passes were granted could be held to be legal, the circumstances under which they were

issued show plainly that the Company was receiving from these public officers for their transportation a greater or less compensation than it was receiving from other passengers for the same service, in direct contravention of the statute and constitutional provisions. If, on the other hand, as we have already held, the contracts under which said passes were issued were void, then there was no consideration, the passes were free and *a fortiori* the company was guilty of illegal discrimination.

Because this company has been confessedly engaged in this practice for many years and because it has brought the law into disrepute and has tried to justify its action by making illegal contracts with public officers, we are of the opinion that, in the case before us, the maximum penalty allowed by the law should be imposed and a fine of $500.00 should be paid to the Commonwealth, and an order will be entered accordingly.

WINGFIELD, Commissioner, concurs.

RHEA, Commissioner, concurs in the result, but not in the reasoning.